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No. 06-1209

In The Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,

Petitioner,

v.

WILLIAM TERRY, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

I. DESPITE *MILLER-EL II*, THERE IS A SPLIT IN THE CIRCUITS REGARDING WHEN COMPARATIVE JUROR ANALYSIS MUST BE RAISED OR WILL BE FOUND WAIVED; AND THE MAJORITY BELOW CONFLICTS WITH *MILLER-EL II* AND MISCONSTRUES THE RECORD

A. There is a conflict between the Eleventh and the Ninth Circuits

At the third step of a *Batson* inquiry, a court *must* assess "the whole of the voir dire testimony subject to consideration," *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("*Miller-El II*"), *must* filter through "all relevant circumstances," *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986), and *must* engage in "'a sensitive inquiry into such circumstantial and direct evidence of [discriminatory] intent as may be possible.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Such a searching inquiry encompasses comparative juror analysis.

Plainly in Petitioner's case the trial court judge and the Georgia Supreme Court had "the transcript of the voir dire, recording the evidence on which [Petitioner] bases his arguments," *Miller El II*, 545 U.S. at 241, and were required sensitively to review "the whole of it" for circumstantial and direct evidence of discriminatory intent. That endeavor should have included comparative juror analysis. Thus, the lower court majority failed to apply *Batson* properly by holding that comparative juror analysis was foreclosed in federal court because of what occurred in state court.

The lower court majority decision conflicts with Ninth Circuit decisions:

> *Boyd v. Newland*, 467 F.3d 1139, 1148, 1151 (9th Cir. 2006), *petition for certiorari filed Jan. 24, 2007* (06-

1032) (*Batson* "contemplate[s] a comparative juror analysis on appeal" and thus an appellate court must have before it "an entire voir dire transcript.");

Kesser v. Cambra, 465 F.3d 351, 361 (9th Cir. 2006) (en banc) (dissent's argument that "a comparative juror analysis is not warranted here, because Kesser 'did not press a comparative juror analysis at trial and developed no basis to support one'" rejected because, *inter alia*, "[t]he 'factual basis' for a comparative juror analysis was part of the 'evidence presented in the State court proceeding.' 28 U.S.C. § 2254 (d)(2). Furthermore, in *Miller-El* the Court made clear that the comparative juror analysis is required even when it was not requested or attempted in the state court."); and

Brown v. Del Papa, 2006 WL 3267778 * 1 - 2 (9th Cir. 2006) (following *Kesser*, where "we held that 'comparative juror analysis is required even when it was not requested or attempted in state court," and *Boyd*, concluding that a state appellate court has the "duty to conduct a comparative juror analysis of the voir dire transcript").

Respondent's assertion that the language in *Boyd* is simply dicta is unpersuasive,[1] but, even if correct, plainly *Kesser* and *Brown* conflict with *Hightower II*. It is wrong for federal

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[1]Respondent argues that the *Boyd* court did not conduct comparative juror analysis but simply held that it in order for a court to conduct such comparisons that court had to have the entire voir dire record. Brief in Opposition (BIO) at 18. The *Boyd* court's holding that comparative juror analysis was required was a necessary antecedent to its holding that, thus, the entire transcript was necessary for a state court on appeal to comply with *Batson*. 467 F.3d at 1150.

petitioners in Georgia, Alabama,[2] and Florida to receive crabbed *Batson* review, while petitioners in California, Arizona, Idaho, Washington, Hawaii, Alaska, Oregon, Montana, and Nevada receive full *Batson* protection.

B. The majority below ignored the *Miller-El II* finding that a *Batson* analysis inherently includes comparing jurors

Before this Court remanded this case for reconsideration in light of *Miller-El II*, no court had held (and the state had never argued) that any portion of Petitioner's *Batson* claim was defaulted. The state did not argue default on remand. The lower court majority, however, held that it could not conduct any comparative jury analysis because Petitioner had not presented such comparisons to the state court.

In a heading to an argument at page 11 of the BIO, Respondent wrote, for the first time, that the majority below "correctly appl[ied] well-settled procedural default principles to bar litigation of petitioner's newly-raised *Batson* argument." In the body of this argument, Respondent cited no cases reflective of these "well-settled" default principles, and could not point to any other court that had held what the lower court majority held here. This is because this Court has already "well-settled" the issue:

> the dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence. See 28 U.S.C. §

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[2]*See, e.g., Wood v. Allen*, 465 F. Supp 2d 1211, 1230 (M.D. Alabama 2006)("Under *Hightower*, the court must conclude that Wood's argument before this court that racial discrimination should have been inferred based upon a comparison with the treatment of white prospective jurors is procedurally barred in this case.").

> 2254(d)(2) (state court factfinding must be assessed 'in light of the evidence presented in the state court proceeding'); *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (habeas petitioner must show unreasonability 'in light of the record before the [state] court.'). **There can be no question that the transcript of the voir dire, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts**...

Miller El II, 545 U.S. at 241 (emphasis added).[3] *See also Kesser v. Cambra*, 465 F.3d at 361 ("[I]n *Miller-El*, the Court made clear that the comparative juror analysis is required even when it was not requested or attempted in the state court"). Plainly the Ninth Circuit and the Eleventh Circuit are in conflict.

C. The majority below ignored the record evidence of Briley's history of race discrimination, contrary to *Miller-El II*, and ignored comparative juror analysis contained in the record

Inconsistent with his argument that the lower court majority could not consider comparative juror analysis, Respondent also argues that the lower court majority "properly considered the totality of the circumstances" (BIO at 14)[4] and

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[3]As Judge Wilson noted in dissent: "No Georgia court has ever found any part of Hightower's *Batson* claim procedurally barred, nor did the majority mention this as a ground for denying relief in the prior vacated opinion." *Hightower v. Terry*, 459 F.3d 1067, 1076 (11th Cir. 2006) (Wilson, J., dissenting).

[4]The majority below *refused* to consider (1) the documented, discriminatory history of prosecutor Briley (Mr. Briley is not mentioned in the argument section of the BIO) *and* (2) comparative juror analysis, both of which fall under the umbrella of "the totality of the circumstances" at the third step of *Batson*.

that "Petitioner merely disagrees with the results of the Eleventh Circuit's properly conducted review of petitioner's *Batson* claim." BIO at 12. Indisputably this is *not* a case of grumbles over the "ultimate conclusion" (*id.*) reached upon a lower court's correct recitation, and application, of this Court's controlling law. Petitioner's legal argument, through and through, is that the lower court majority opinion was not true to and did not apply this Court's *Batson* law. The suggestion that Petitioner is asking this Court simply "'to review evidence and discuss specific facts'" (*id.*) is specious.

II. THE LOWER COURT MAJORITY (AGAIN) CONFLATED STEPS TWO AND THREE OF THIS COURT'S MANDATED, SEPARATE, THREE-STEP *BATSON* INQUIRY

The only finding made by the trial court judge in this case was that the prosecutor had stated race-neutral reasons for his strikes of African-American jurors. Nevertheless, the majority below held that the trial court judge implicitly found that none of the reasons proffered were false or pretextual. This reasoning eliminates the third step of *Batson*, as the Delaware Supreme Court recognized in *Jones v. State*, ___ A.2d___, 2007 WL 666333 (Del. Supr. March 6, 2007), the day before the certiorari petition was submitted in this case:

> The analysis does not end once the state proffers a race neutral reason. Instead, after the prosecutor offers a race-neutral explanation, the burden shifts back to the defendant to prove purposeful discrimination. At this point, the "trial judge assesses the persuasiveness of the facially race-neutral justification by considering the 'totality of the relevant facts.'" "If the prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain

> race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." This third analytical step is necessary because the reason offered for each particular strike cannot be viewed in isolation; rather, the plausibility of each explanation "may strengthen or weaken the assessment of the prosecution's explanation as to other challenges."
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> . . . . .
>
> **The record does not show that the trial judge performed the third step of the analysis. Instead, the trial judge simply noted in response to each *Batson* challenge that the state gave a race-neutral response. We therefore conclude** that this case must be remanded for a complete *Batson* analysis.

Id. at * 4 (emphasis added) (footnotes and internal citations omitted). The exact same thing happened in Petitioner's case, and the majority's holding below that step three is subsumed in step two is inconsistent with *Batson* and conflicts with *Jones*.

Respectfully submitted,

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